

VZCZCXYZ0002  
RR RUEHWEB

DE RUCNDT #0030/01 0162252  
ZNR UUUUU ZZH  
R 162252Z JAN 09  
FM USMISSION USUN NEW YORK  
TO SECSTATE WASHDC 5645

UNCLAS USUN NEW YORK 000030

SIPDIS

FOR IO/MPR - G. ABRAHAMS

E.O. 12958: N/A

TAGS: [AORC](#) [AMGT](#) [PREL](#) [UNGA](#) [UNGA](#) [UNGA](#)

SUBJECT: UN SUCCEEDS IN LAUNCHING NEW ADMINISTRATION OF  
JUSTICE SYSTEM

REF: 07 USUN 01223

¶1. SUMMARY: At the main session of the sixty-third UN General Assembly, the Fifth Committee adopted a resolution (A/RES/63/253) that completely overhauls the organization's internal justice system for resolving employment-related disputes. Building on a framework resolution from the previous General Assembly as well as on the work of the Sixth Committee prior to and at the start of the most recent UN General Assembly, the Committee approved a new administration of justice system that significantly improves both the informal and formal processes for dispute resolution. It is scheduled to be fully operational by July 1, 2009. During the past year, the United States, with help on various issues from a other Member States, was successful in substantially revising the Secretary-General's proposals, which were initially supported by almost all Member States, including the EU, CANZ, and G-77. The USG from the outset voiced principled objections to the Secretary-General's proposals, maintaining that, if adopted, they would have created an unwieldy, inefficient, and costly system of justice. END SUMMARY

¶2. As reported in reftel, UN Resolution A/RES/62/228 established the framework for a new system of administration of justice to replace the one that had been in effect and largely unchanged for fifty years. However, the details of the new system remained to be negotiated in the Fifth and Sixth Committees. These details included the statutes for the new two-tier formal system of UN Dispute Tribunal (UNDT) and UN Appeals Tribunal (UNAT) that address the critical issues of the scope of the new system and the legal standards for resolving claims as well as for reviewing decisions on appeal. They also included transitional measures for phasing out the old system and implementing the new system and the precise role to be played by the new Office of Staff Legal Assistance.

#### CLOSE COORDINATION BETWEEN SIXTH AND FIFTH COMMITTEES

¶3. The new two-tier formal system will be governed by statutes that were adopted as Annexes to the resolution. As they involve not only administrative elements but also complex matters of jurisprudence, the Sixth Committee initially considered draft statutes that would govern the operations of the UNDT and UNAT, meeting last April and July as an ad hoc working group. The Sixth Committee met again at the start of the Sixty-Third Session and completed its work on the statutes in October, and then sent them to the Fifth Committee for final consideration. USUN and Department legal and non-legal staff worked together in successfully pursuing USG objectives in both committees.

STATUTES FOR FORMAL SYSTEM REVISED TO BE CONSISTENT WITH U.S. POSITIONS

¶4. The statutes differ significantly from the original drafts proffered by the Secretary-General. As a result of the

persistence and pragmatism of the USG, in both the Sixth and Fifth Committees, the statutes are consistent with U.S. objectives.

#### 15. Key provisions of the statutes for the new UN Dispute Tribunal (UNDT):

- Number of judges (Annex I, Article 10, para 9): Although the SYG proposed and most Member States, the EU in particular, pressed for all cases before the UNDT to be heard by a panel of three judges, the statute reflects the U.S. position and calls for cases normally to be heard by a single judge. This both expedites the processing of cases and holds down the cost of proceedings. In a compromise fashioned by the USG, the statute does allow the President of the UNDT to request the UNAT President to authorize the referral of a case to a three-judge UNDT panel, when necessary by reason of the particular complexity or importance of the case.

- Awarding of compensation (Annex I, Article 10, paras. 5, 6, and 7): The U.S. succeeded in preventing a change from the old system to a system proposed by the SYG, and supported initially by most Member States, that would have provided unlimited compensation as well as costs and interest. In keeping the language of the old system, compensation would normally be limited to the equivalent of two years' net base salary while allowing for higher compensation in exceptional cases. Under the consistent practice of the old system, such higher compensation would be limited to a third year. Some Member States wanted to include provisions, not in the old statute, for payment of exemplary or punitive damages, costs (including attorneys' fees), and interest. The Mission succeeded in keeping these out of the statute. Mission was

also successful in obtaining a provision requiring parties found to manifestly abuse UNDT proceedings to pay costs.

- Scope (Annex I, Article 3, para. 1): The Mission successfully resisted a proposal by the SYG, initially supported by the EU, CANZ, G-77 and others, to expand scope beyond that provided under the old system, covering current or former staff members, or their representative. Thus, efforts to include non-staff, such as personal services contractors, were unsuccessful. The Sixth Committee's Ad Hoc Committee will address this issue in its April session and, per para. 8 of the resolution, the issue of scope will be reconsidered at the sixty-fifth UNGA.

- Role of staff associations (Annex I, Article 2, para. 3): The United States successfully also resisted a proposal by the SYG, initially supported by the EU, CANZ, and G-77, to allow suits by staff associations bringing claims in their own right, as well as class action suits. The USG crafted a limited compromise whereby the UNDT can permit or deny the application by a staff association to file a friend-of-the-court brief.

#### 16. Key elements of the statutes for the new UN Appeals Tribunal (UNAT):

- The USG successfully resisted a proposal by the SYG, initially supported by the EU, CANZ, and G-77, to allow the new UNAT generally to address new facts on appeal. Instead, the UNAT statute provides for stringent limitation on introduction of new evidence (Annex II, Article 2, para. 5). Appeals will normally be limited to questions of law. The USG crafted a limited compromise whereby the UNAT, in exceptional cases, may consider additional documentary evidence, but no new testimony. If the UNAT determines that a decision cannot be taken without oral testimony, it will remand the case to the UNDT.

- Awarding of compensation (Annex II, Article 9, paras. 1, 2, 3): The provisions are the same as for the UNDT.

- Access by UN Joint Staff Pension Fund and Specialized Agencies (Annex II, Article 2, paras. 9, 10): The UNAT shall

serve as the second-instance tribunal for cases heard initially by the Standing Committee acting on behalf of the UN Joint Staff Pension Board. The UNAT shall also be competent to hear cases brought against a specialized agency, provided the agency has concluded an agreement with the UNAT for that purpose and utilizes a neutral first instance process that includes written documentation of proceedings. A similar provision appears in the UNDT statute. (Annex I, Article 2, para 5).

#### USG FENDS OFF ATTEMPT TO MIX OLD AND NEW SYSTEMS FOR TRANSITION PURPOSES

¶7. The Secretary-General proposed and the EU, CANZ, and G-77 initially supported the transfer of cases pending in various stages in the old system immediately to the new system. The USG sought on a principled and practical basis to prevent a mixing of the two different systems. The U.S. proposed that all cases that had been taken up by the JAB/JDC and the Administrative Tribunal should be completed under the current system and not be transferred to the new system. The USG negotiated a compromise that will maintain the distinction between the two systems for up to a year. This compromise (Section IV of the resolution) calls for the following:

- abolishing JAB's/JDC's as of July 1, 2009, with pending cases transferred to the UNDT as of that date;
- providing an option for any cases ready for filing in the JAB/JAC after December 31, 2008, to be filed under the new system;
- extending of the UN Administrative Tribunal through December 31, 2009;
- authorizing honorariums for UNAT members as of January 1, 2009;
- requesting 2009 sessions of the UN Administrative Tribunal to be moved up and authorizes extension of UNAT sessions by up to four weeks;
- transferring cases pending before the UN Administrative Tribunal as of December 31, 2009 to the UN Dispute Tribunal.

¶8. The Mission hopes that this compromise will allow most cases currently pending before the JDC/JAB and the Administrative Tribunal to be processed before the end of 2009, minimizing the overlap between the two systems and the backlog of cases from the old system in the new system.

#### USG FENDS OFF ATTEMPT TO REQUIRE UN LEGAL REPRESENTATION FOR CLAIMANTS AND PROMOTES CONSIDERATION OF ALTERNATIVES

¶9. Resolution 62/228 replaced the Panel of Counsel, which assists claimants with their claims, with the Office of Staff Legal Assistance (OSLA). Under the Panel of Counsel, staff traditionally were assisted by other staff members who volunteered to represent them in JAB, JDC, or UNAT proceedings. In the late 1990's, however, the Panel of Counsel received temporary funding from the peacekeeping support account that was utilized by the Panel to hire professional legal staff to represent staff and came to rely more on them than on volunteers. The Secretary-General proposed to expressly provide that the new OSLA would act as counsel of record for claimants, thereby formally creating a legal aid entity that has very large potential financial implications for the Organization. While agreeing to the transformation of the Panel of Counsel to the OSLA, the USG successfully resisted the creation of a specific mandate that the office represent claimants. The USG insisted that the more ambiguous status quo be maintained while calling for incentives for staff to continue to volunteer and for proposals for an alternative UN staff funded legal representation regime. Section I, paras. 9-14 and 16 of the new resolution calls on the Secretary to do the following:

- provide incentives to encourage current and former staff to assist staff members in resolving disputes;
- develop incentives to enable and encourage staff to participate in the work of the OSLA;

- report at the sixty-fifth UNGA on proposals for staff-funded schemes to provide legal assistance and support to staff'.

¶10. The resolution ensures that the mandate and function of the OSLA, including the possibilities for enhanced participation of volunteers and of a staff-funded scheme for representing claimants, will be reviewed at the sixty-fifth session.

#### TIMELINE FOR IMPLEMENTATION AND REVIEW

¶11. The new system of administration of justice is now a fait accompli. However, the Fifth Committee will be addressing the following additional actions or issues relating to the implementation of the new system:

- Terms of reference for UNDT and UNAT registries to be provided by the Secretary-General (as soon as possible)
- Election of UNDT and UNAT judges (probably no sooner than mid-February or March 2009)
- Report by the Secretary-General for the UN entities covered by the integrated Office of the Ombudsman (2009)
- Discussion of alternative dispute resolution options for non-staff (April 2009 session of Sixth Committee Ad Hoc Committee)
- Concluding of cost-sharing arrangements, based on head count with the relevant funds and programs (June 30, 2009)
- Rules of procedure for UNDT and UNAT to be approved (sixty-fourth UNGA)
- Abolishment of UN Administrative Tribunal and transfer of residual cases to UNDT (December 31, 2009)
- Clarification of the role of the Department of Management in the evaluation process (Sixty-fifth session)
- Review of adopted and deferred elements of the new Administration of Justice system, to include, inter alia, scope, mandate and functioning of the Office of Staff Legal Assistance, staff-funded scheme for legal assistance and support, filing of claims by staff associations, and UNDT/UNAT statutes (Sixty-fifth session)

¶12. COMMENT: The significance of this resolution cannot be overstated. By the end of 2009 all elements of the previous formal system will cease to exist and the new system will be fully staffed and operational. The expansion of the Ombudsman's office, the creation of the Office of Mediation, and requirement that all disputed actions be subject to administrative review should reduce the percentage of cases resolved via the formal level. This should then result in more expeditious processing of cases that reach the formal system. There will no doubt be some adjustments made based on experiences with the new system, but the efforts made by all interested parties has produced a new system of administration of justice that is a vast improvement over what previously existed.

Khalilzad